THE PROSECUTOR'S MANUAL

Chapter 20

RULE 32 - POST-CONVICTION RELIEF

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I. INTRODUCTION

This manual is intended to be used as a guide for defeating petitions for post-conviction relief (PCR) in Arizona. It is a starting point for research on the issue.

The main emphasis of this manual is to require the defendant to meet all his burdens. By the end of the manual, the prosecutor will be able to look at a defendant's petition and know what requirements were not met. The prosecutor will know how to make the petitioner go back and get the form right and then know how to defeat the petition on the merits if necessary.

A. Post-Conviction Relief

Post-conviction relief is governed by Rule 32 and A.R.S. § 13-4231 et. seq. With a few exceptions, the wording of the statutes and Rule mirror each other.

1. Rule 32

Previously post-conviction relief was accomplished in Arizona solely through Rule 32, Arizona Rules of Criminal Procedure (hereinafter referred to as Rule 32). Before Rule 32, Arizona had seven separate and distinct avenues of relief: appeal, federal and Arizona *habeas corpus*, writ of *coram nobis*, motion for new trial or newly discovered evidence, and the motion to modify or vacate judgment. Rule 32.1, comment.

Under Rule 32, the last five areas of relief are consolidated into one comprehensive remedy. This is much more efficient because the courts are not inundated with several different petitions and motions from one defendant. Rule 32 is judicially efficient because it allows the judge to summarily dismiss any frivolous claims. Rule 32.1, comment.

A Rule 32 petition does not replace *habeas corpus*. Rule 32.3. See *Noble v. State*, 109 Ariz. 537, 514 P.2d 458 (1973). For the sake of efficiency, a *habeas corpus* petition may be treated as a Rule 32 petition. *Floyd v. Superior Court*, 134 Ariz. 472, 474, 657 P.2d 885, 887 (App. Div. 2 1982). Rule 32 is a procedural mechanism and has not replaced the *habeas corpus* right. Thus, there is no constitutional right to post-conviction review. *Pennsylvania v. Finley*, 481 U.S. 551, 555, 107 S.Ct. 1990, 1993 (1987); *State v. Thompson*, 139 Ariz. 552, 554, 679 P.2d 575, 577 (App. Div. 1 1984).

2. A.R.S. § 13-4231 et seq.

The relief offered by Rule 32 was often abused. Cf. *State v. McFord*, 132 Ariz. 132, 644 P.2d 286 (App. Div. 1 1982) (court expressed displeasure at seventh Rule 32 petition). Therefore, the legislature passed Article 29 of Title 13 (A.R.S. § 13-4231 et seq.) with certain key changes. The purpose of the statutes was to require that all grounds possible be raised in one timely petition. However, the time limit portion of the statute were declared unconstitutional as an infringement upon the Supreme Court's rule making authority. *State v. Fowler*, 156 Ariz. 408, 413,752 P.2d 497, 502 (App. Div. 1 1987). That provision has since been removed and there are now few differences between the post-conviction statutes and Rule 32.

In addition to the remaining minor differences, A.R.S. § 13-4240 regarding post-conviction DNA testing has no Rule 32 equivalent and is thus governed solely by statute.

B. Conflict Between the Rule and Statutes

Shortly after the legislature originally enacted Article 29, an obvious conflict existed between the Rule and statutes. The statutes contained a statute of limitations that was not present in the rule. In *State v. Fowler*, 156 Ariz. 408, 413-14,752 P.2d 497, 502-03 (App. Div. 1 1987), the court declared the statutory limitation unconstitutional, holding that "when a conflict arises, or a statutory rule tends to engulf a general rule of admissibility, we must draw the line." The Arizona Supreme Court approved of the Fowler decision in *State v. Bejarano*, 158 Ariz. 253, 762 P.2d 540 (1988). Accordingly, whenever A.R.S. § 13-4231 et seq. conflicts with Rule 32, the provisions of the Rule must govern the action.

C. Who May Seek Relief

The provisions of Rule 32 set forth proceedings constituting traditional collateral attacks on a conviction and sentence when relief is sought by a defendant who went to trial. See Rule 32.1, comment and *State v. Carriger,* 143 Ariz. 142, 692 P.2d 991 (1984). However, because a guilty plea waives the right to direct appeal, PCR proceedings are considered the equivalent of a direct appeal for a pleading defendant. *Montgomery v. Sheldon*, 182 Ariz. 118, 893 P.2d 1281 (1995); *State v. Ward*, 211 Ariz. 158, 118 P.3d 1122 (App. Div. 1 2005).

Because "any person who has been convicted of, or sentenced for, a criminal offense" may obtain relief pursuant to Rule 32.1, a petitioner may institute PCR proceedings for convictions originating in superior and municipal courts, regardless of whether the offense was a felony or misdemeanor. *State v. Aguilar*, 170 Ariz. 292, 823 P.2d 1300 (App. Div. 1 1991).

Rule 32 relief is also available to petitioners whose probation has been revoked. *State v. Robbins*, 166 Ariz. 531, 803 P.2d 942 (App. Div. 1 1991). A PCR allows the defendant, under certain circumstances, to attack the factual or legal basis for the admission or to attack the process by which the admission of probation violation was accepted by the judge. *Wilson v. Ellis*, 176 Ariz. 121, 123, 859 P.2d 744, 746 (1993). A petitioner may seek PCR relief for the court's failure to advise defendant, who admitted to violation of probation in revocation hearing, that admission could be used against him at trial on criminal charges. *State v. Glad*, Ariz. 483, 484, 826 P.2d 346, 347 (App. Div. 1 1992).

II. STARTING THE PROCESS

The petitioner initiates a Rule 32 petition by filing a notice and petition in the superior court where he was convicted. *State v. Scrivner*, 132 Ariz. 52, 643 P.2d 1022 (App. Div. 1 1982), *disapproved of on other grounds by State v. Sprietz,* 202 Ariz. 1, 39 P.3d 525 (2002). The petition is supposed to be on the proper form and raise every possible claim for relief. *State v. Grier*, 146 Ariz. 511, 513, 707 P.2d 309, 313 (1985), quoting Rule 32.10. The petitioner must assert substantive legal or factual grounds in order to be entitled to relief. *State v. Manning*, 143 Ariz. 139, 141, 692 P.2d 318, 320 (App. Div. 1 1984).

The prosecutor should make sure that the petitioner follows all procedural rules and that the petitioner meets his standard of proof every step of the way. If not, the court may permit the defendant to raise an otherwise precludable issue in a subsequent PCR and the prosecutor will have to go through this

process again. Even the appellate courts get sick of these petitions. *State v. Thompson*, 120 Ariz. 202, 584 P.2d 1193 (App. Div. 1 1978) (prosecutor was reprimanded for failure to raise preclusion).

Remember that a Rule 32 petition is a safeguard and is not intended to give the petitioner an unlimited avenue of review. *State v. Carriger*, 143 Ariz. 142, 145, 692 P.2d 991, 994 (1984). "Post-conviction relief is not designed to add to the law's delays by giving an accused three days in court where one is sufficient for doing substantial justice under fundamental law nor to grant an additional and fully repetitious appeal, and accordingly, the issues disposed of on the previous appeal ... will not be disturbed." *State v. Guthrie*, 111 Ariz. 471, 473, 532 P.2d 862, 864 (1975).

A. Notice of Post-Conviction Relief

Rule 32.4(a) sets forth the procedure for filing a notice of post-conviction relief. The petitioner must file a notice in the same court in which the conviction occurred. "Any notice not timely filed may only raise claims pursuant to Rule 32.1(d), (e), (f), (g) or (h)." *Id*.

1. Time Limits

Rule 32.4(a) provides the following time limits for filing a notice of post-conviction relief:

> In a Rule 32 of-right proceeding, the notice must be filed within ninety days after the entry of judgment and sentence or within thirty days after the issuance of the final order or mandate by the appellate court in the petitioner's first petition for post-conviction relief proceeding. In all other non-capital cases, the notice must be filed within ninety days after the entry of judgment and sentence or within thirty days after the issuance of the order and mandate in the direct appeal, whichever is the later. In a capital case, the clerk of the Supreme Court shall expeditiously file a notice for post-conviction relief with the trial court upon the issuance of a mandate affirming the defendant's conviction and sentence on direct appeal.

The time to file a notice of post-conviction relief begins to run when the sentence is "orally pronounced in open court and entered in the minutes without anything further or any written judgment." *State v. Rosario*, 195 Ariz. 264, 266, 987 P.2d 226, 228 (App. Div. 1 1999), citing *State v. James*, 110 Ariz. 334, 337, 519 P.2d 33, 36 (1974). A petitioner with a pending direct appeal may file a PCR notice at any time before 30 days after the mandate is issued. The PCR need not be suspended pending final decision on the direct appeal. *State v. Jones*, 182 Ariz. 432, 433-34, 897 P.2d 734, 735-36 (App. Div. 1,1995).

If a prisoner timely gives his notice of petition for post-conviction relief to the Department of Corrections for mailing, his notice must be considered timely filed even if it is untimely received by the court. *Rosario*, 195 Ariz. at 266, 987 P.2d at 228.

"A second notice of post-conviction relief for a claim of ineffectiveness of previous Rule 32 counsel is timely if filed within 30 days of the order and mandate affirming the trial court's denial of the petitioner's first petition for post-conviction relief." *State v. Pruett*, 185 Ariz. 128, 131, 912 P.2d 1357, 1360 (App. Div. 1 1995).

If an appellate court vacates a defendant's sentence and remands the case to the trial court for resentencing, the time to file a PCR notice begins to run after the resentencing, not the original sentencing date. *State v. Viramontes*, 211 Ariz. 115, 118 P.3d 630 (App. Div. 2 2005).

2. Duties of the Court

Once the court receives the petitioner's notice, it must file a copy of the notice in the original case file

and "promptly" send copies to the defendant and his attorney, if known, the county attorney, and the attorney general or the prosecutor. Rule 32.4(a).

Upon the petitioner's request, the court shall order the preparation of certified transcripts for those portions of the record it deems necessary to resolve the issues raised in the petition. Rule 32.4(d). If the petitioner is indigent, the county shall pay the cost of transcription. *Id*. "The time for filing the petition shall be tolled from the time a request for the transcripts is made until the transcripts are prepared or the request is denied. Certified transcripts shall be prepared and filed within sixty days of the order granting the request." *Id*.

The presiding judge receives the notice of post-conviction relief but must assign the proceeding to the sentencing judge if possible. Rule 32.4(e). If the sentencing judge's testimony will be relevant, the case may be reassigned to a different judge. *Id*.

The court (or the clerk) is also required to notify the appellate court that a PCR notice has been filed if the direct appeal is still pending. Rule 32.4(b). "If a petition is filed while an appeal is pending, the appellate court … may stay the appeal until the petition is adjudicated. Any appeal from the decision on the petition will then be joined with the appeal from the judgment or sentence." Rule 32.4(b), comment.

Courts are not required to conduct a review for fundamental error when a defendant files a *pro se* PCR petition. The court may summarily dismiss the petition, if appropriate. *Montgomery v. Sheldon*, 181 Ariz. 256, 889 P.2d 614 (1995).

3. Duties of the State

The state must notify any victim who has requested notice of post-conviction proceedings. Rule 32.4(a). In capital cases, a notice of appearance may be filed pursuant to A.R.S. § 13-4234.01(A).

4. Appointment and Duties of Defense Counsel

A petitioner proceeding without counsel has 60 days to file a petition from the date he files his notice or from the date his request for counsel is denied. Rule 32.4(c)(2); *State v. Rodriguez*, 183 Ariz. 331, 903 P.2d 639 (App. Div. 1 1995).

a. Appointment of Counsel

Rule 32.4(c) sets forth the procedure for appointment of counsel in capital and non-capital PCRs. In Rule 32 of right and non-capital proceedings, the presiding judge shall appoint counsel for the petitioner within 15 days of the timely filing of a notice if the petitioner requests an attorney and is determined to be indigent. Rule 32.4(c)(2). See also *State v. Smith*, 184 Ariz. 456, 459, 910 P.2d 1, 4 (1996)("an indigent pleading defendant is entitled to appointed counsel for the trial court PCR proceedings ... and is also entitled to a transcript of the plea proceedings").

In subsequent Rule 32 proceedings, the appointment of counsel is left to the discretion of the presiding judge. *Id*. Nevertheless, the court may appoint counsel for a petition for review when the interests of justice require it. *State v. Smith*, 184 Ariz. 456, 459 n.2, 910 P.2d 1, 4 (1996). For capital cases, the presiding judge automatically appoints counsel for the PCR, which must be filed within 120 days from the filing of the notice. Rule 32.4(c)(1).

If the court finds the petitioner is indigent, appointment of counsel is mandatory on a Rule 32 of-right proceeding. *Galaz v. Carruth*, 129 Ariz. 368, 370, 631 P.2d 523, 525 (1981); *State v. Smith*, 184 Ariz. 456, 458, 910 P.2d 1, 3 (1996). The trial court is not obligated to appoint counsel for a second PCR alleging ineffective assistance of counsel. *State v. McDonald*, 192 Ariz. 44, 45, 960 P.2d 644, 645 (App. Div. 1 1998).

If the petitioner already has appointed counsel, he will not be allowed substitute counsel unless he establishes that his appointed counsel was ineffective. *State v. Vasquez*, 142 Ariz. 527, 530, 690 P.2d 1240, 1243 (App. Div. 1 1984) (trial court did not err in not substituting appointed counsel for post-conviction relief proceedings where defendant failed to establish counsel ineffective). Even though Arizona affords post-conviction counsel, the Supreme Court has never held that prisoners have "a constitutional right to counsel when mounting collateral attacks to their convictions." *Pennsylvania v. Finley*, 481 U.S. 551, 555, 107 S.Ct. 1990, 1993 (1978).

b. Duties of Counsel

After counsel has been appointed in a non-capital proceeding, he has 60 days from the date of appointment to file a petition raising claims under Rule 32.1 Rule 32.4(c)(2). The court may grant one 30 day extension of the deadline upon showing of good cause. *Id*. "Additional extensions of thirty days shall be granted only upon a showing of extraordinary circumstances." *Id*.

Rule 32.4(c)(2) directs defense counsel to investigate the petitioner's case for "any and all colorable claims." If there are no colorable claims, counsel must file a notice advising the court of this determination. *Lammie v. Barker,* 185 Ariz. 263, 915 P.2d 662 (1996); *State v. Smith*, 184 Ariz. 456, 459, 910 P.2d 1, 4 (1996). From that point on, the attorney acts as advisory counsel to the petitioner, who may file a pro se petition within 45 days after counsel's notice is filed with the court. Rule 32.4(c)(2). The petitioner must show extraordinary circumstances to receive any extensions beyond the 45 days set forth in the rule. *Id.*

"Counsel does not have a constitutional duty to raise every non-frivolous issue requested by a criminal defendant." *State v. Vasquez*, 142 Ariz. 527, 530, 690 P.2d 1240, 1243 (App. Div. 1 1984).

The right to counsel in Rule 32 proceedings does not extend to the petition for review in the appellate courts. *State v. Smith*, 184 Ariz. 456, 459, 910 P.2d 1, 4 (1996). After the trial court disposes of the Rule 32 petition, counsel "need only inform the defendant of the status and defendant's future options, unless counsel's review, or that of the trial court, reveals an issue appropriate for submission to the court of appeals." *Id*.

B. The Petition for Post-Conviction Relief

1. Contents

Rule 32.5 states in relevant part:

> The defendant shall include every ground known to him or her for vacating, reducing, correcting or otherwise changing all judgments or sentences imposed upon him or her, and certify that he or she has done so. Facts within the defendant's personal knowledge shall be noted separately from other allegations of fact and shall be under oath. Affidavits, records, or other evidence currently available to the defendant supporting the allegations

of the petition shall be attached to it. Legal and record citations and memoranda of points and authorities are required.

A.R.S. § 13-4235 substantially reiterates this Rule.

The petitioner must provide the court with the evidence that supports his position. *State v. Watson*, 120 Ariz. 441, 450, 586 P.2d 1253, 1262 (1978)(petitioner must provide evidence that counsel was ineffective, not merely unsuccessful). If the petitioner provides the evidence, then the court is in a position to decide whether a hearing is necessary.

The petitioner must distinguish personal knowledge from the facts and the petition must include all supporting affidavits and evidence available. *State v. Borbon*, 146 Ariz. 392, 399-400,706 P.2d 718, 725-26 (1985) (petitioner failed to indicate names of witnesses or give affidavits of their potential testimony and, therefore, could not support a claim of ineffective assistance of counsel); *State v. Gunter*, 132 Ariz. 64, 643 P.2d 1034 (App. Div. 1 1982) (petitioner had to attach medical records to his petition in order to support claim that he had ingested prescription medication prior to his guilty plea and was, therefore, entitled to an evidentiary hearing on the issue of voluntariness).

The purpose of the requirements is to provide the court with all the essential materials to facilitate review of the claims and "to furnish an evidentiary forum for the establishment of facts for relief, when such facts have not previously been established on record." *State v. Scrivner*, 132 Ariz. 52, 54, 543 P.2d 1022, 1024 (App. Div. 1 1982), *disapproved of on other grounds by State v. Sprietz*, 202 Ariz. 1, 39 P.3d 525 (2002); Rule 32.5, comment. A legal memorandum with citations is not required and an incomplete petition is not a ground for dismissal. The petition shall be sent back to the petitioner until he completes the petition. Rule 32.5(a); *See State v. Ramirez*, 126 Ariz. 464, 616 P.2d 924 (App. Div. 1 1980) (amendments are liberally allowed).

2. Page Limitations

Rule 32.5 sets forth strict page limitations for both capital and non-capital petitions. In Rule 32 of right and non-capital cases, neither the petition nor the response can exceed 25 pages. The reply shall not exceed 10 pages. In capital PCRs, neither the petition nor the response shall exceed 40 pages and any reply must not exceed 20 pages.

3. Failure to Comply

The court must return to the petitioner any petition which fails to comply with Rule 32.5 with an order specifying how the petition fails to comply with the rule. Rule 32.5. The petitioner then has 30 days to amend his petition to comply with the rule. *Id*. If he fails to do so, "the court shall dismiss the proceedings with prejudice." *Id*. If the petitioner successfully files an amended and compliant petition, the state's period for response begins on the date a returned petition is refiled. *Id*.

C. Grounds for Relief

The grounds for a Rule 32 petition are laid out in Rule 32.1 and A.R.S. § 13-4231. Rule 32.1(a) permits relief on the grounds that "[t]he conviction or the sentence was in violation of the Constitution of the United States or of the State of Arizona." Subsection (b) provides relief if the petitioner can show that the court did not have jurisdiction to render judgment or impose sentence. If the petitioner's sentence exceeded the maximum authorized by law or was "otherwise not in accordance with the sentence authorized by law," the petitioner may obtain post-conviction relief

under Rule 32.1(c). Subsection (d) provides post-conviction relief if the petitioner is being held in custody after his sentence has expired.

New facts and new law may form the basis of a successful post-conviction petition. A petitioner may obtain appropriate relief if a significant change in the law would probably overturn his conviction or sentence. Rule 32.1(g). Newly-discovered evidence may provide the basis for a post-conviction relief claim if the petitioner can show that material newly discovered facts exist that probably would have changed the verdict or sentence. Rule 32.1(e). This differs from the standard in subsection (h) which encompasses claims of actual innocence. For an actual innocence claim, the petitioner must demonstrate "by clear and convincing evidence that the facts underlying the claim would be sufficient to establish that no reasonable fact finder would have found the defendant guilty of the underlying offense beyond a reasonable doubt" or sentenced him to death. Rule 32.1(h).

Finally, a petitioner may seek relief if his failure to appeal or file a PCR notice within the prescribed time was without fault on his part. Rule 32.1(f). He may not, however, use a PCR proceeding to attack matters adjudicated on their merits in a direct appeal. *State v. Wallace*, 160 Ariz. 424, 773 P.2d 983 (1989).

1. Rule 32.1(a) - Ineffective Assistance of Counsel

The traditional collateral attacks - ineffective assistance of counsel and other constitutional issues - are encompassed in Rule 32.1(a). Rule 32.1(a), comment.

a. When to Bring Claim

The Arizona Supreme Court has held that a petitioner "may bring ineffective assistance of counsel claims only in a Rule 32 post-conviction proceeding - not before trial, at trial, or on direct review." *State ex rel. Thomas v. Reyes*, 214 Ariz. 411, 415, 153 P.3d 1040, 1044 (2007). However, an ineffective assistance of counsel claim may not be premature if it is brought before resentencing after remand if the same attorney who represented the petitioner on the direct appeal represents the petitioner for resentencing. *State v. Rosales*, 205 Ariz. 86, 89, 66 P.3d 1263, 1266 (App. Div. 2 2003).

b. Pleading Defendants

A defendant who pleads guilty does not have a right to a direct appeal. Consequently, he "is constitutionally entitled to the effective assistance of counsel on his first petition for post-conviction relief, the counterpart of a direct appeal." *State v. Pruett*, 185 Ariz. 128, 131, 912 P.2d 1357, 1360 (App. Div. 1 1995). Furthermore, he must be afforded an opportunity to assert an ineffective appellate counsel claim in a second Rule 32 action. *Id.*

c. Standard of Proof

Ineffective assistance of counsel must be proved by establishing that the defense counsel's performance was deficient and that the deficient performance prejudiced the defense. *State v. Santanna*, 153 Ariz. 147, 149, 735 P.2d 757, 759 (1987). The burden of proof is on petitioner for post-conviction relief to show ineffective assistance of counsel by preponderance of evidence. *State v. Andersen*, 177 Ariz. 381, 385-86, 868 P.2d 964, 968-69 (App. Div. 1 1993).

The presumption is that counsel acted with reasonable competence and that the challenged action was sound trial strategy. *State v. Walton*, 159 Ariz. 571, 592, 769 P.2d 1017, 1038 (1989); *Strickland v. Washington*, 446 U.S. 668, 104 S.Ct. 2052 (1984). The petitioner has the burden of specifying what

acts or omissions constituted ineffective assistance. *Santanna, supra*. The court will find the performance ineffective only if the counsel's performance fell below objective standards of reasonable representation measured by prevailing professional norms. *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1987).

The proof of ineffective assistance of counsel must be to a demonstrable reality rather than a matter of speculation. *State v. McDaniel*, 136 Ariz. 188, 198, 665 P.2d 70, 80 (1983), *abrogated on other grounds by State v. Walton*, 159 Ariz. 571, 769 P.2d 1017 (1989). The determination of ineffectiveness must be made from the record. *State v. Bush*, 148 Ariz. 325, 328, 714 P.2d 818, 821 (1986).

For a successful ineffective assistance of counsel claim, the court must find that the petitioner was prejudiced by counsel's substandard performance. *State v. Moyer*, 151 Ariz. 253, 727 P.2d 31 (App. Div. 2 1986) (counsel ineffective but petitioner failed to show prejudice, conviction affirmed); *State v. Cook*, 150 Ariz. 470, 724 P.2d 556 (1986) (if counsel was ineffective for advising waiver of appeal for fear of death penalty on remand, no prejudice existed because petitioner got delayed appeal).

d. Plea Negotiation Claims

Defense counsel has a duty to communicate the terms of a plea offer and the relative merits of the offer compared to the defendant's chance at trial. *State v. Donald*, 198 Ariz. 406, 411, 10 P.3d 1193, 1198 (App. Div. 1 2000). Accordingly, a petitioner may seek relief from a conviction on the basis that counsel's ineffective assistance induced a guilty plea. *See e.g. State v. Ysea*, 191 Ariz. 372, 379, ¶¶ 23-24, 956 P.2d 499, 506 (1998). When a petitioner claims that his counsel's ineffectiveness induced him to plead guilty, he must show a reasonable probability that but for counsel's errors, he would not have pleaded guilty and would have gone to trial. *State v. Bowers*, 192 Ariz. 419, 424, 966 P.2d 1023, 1028 (App. Div. 1 1998). He need not show a likelihood of acquittal. *Id*. To state a colorable claim, the petitioner must allege specific facts that would allow the court to "meaningfully assess why that deficiency was material to the plea decision." *Id*. at 425, 966 P.2d at 1029.

Moreover, a petitioner can show his attorney was ineffective during plea negotiations if he demonstrates that the ineffective assistance led the petitioner to make an uninformed decision to reject a plea bargain and proceed to trial. *Donald*, 198 Ariz. at 413, 10 P.3d at 1200. "To establish deficient performance during plea negotiations, a petitioner must prove that the lawyer either (1) gave erroneous advice or (2) failed to give information necessary to allow the petitioner to make an informed decision whether to accept the plea." *Id*. The petitioner will not make a colorable claim based on conclusory allegations alone; he must "support such allegations by sworn statements or provide a satisfactory explanation of their absence." *Id*.

To establish prejudice in the rejection of a plea offer, a petitioner must show "a reasonable probability that, absent his attorney's deficient advice, he would have accepted the plea offer" and declined to go forward to trial. *Id*. at 414, 10 P.3d at 1201. Although this prong will be difficult to prove, prejudice may be inferred by establishing a serious negative consequence, such as a substantially longer or harsher sentence after trial. *Id*. A petitioner's claim that he would have refused all plea offers from the state will preclude relief even if counsel failed to communicate previous offers. *State v. Pac*, 175 Ariz. 189, 854 P.2d 1175 (App. Div. 1 1993).

The court should hold a hearing to determine the proper remedy for a *Donald* claim, which may include an order to reinstate the plea offer or an order for a new trial. *Id*. at 415, 10 P.3d at 1202. At the hearing, the prosecution must be given the opportunity to present any facts and considerations that lead it to oppose reinstatement of the plea if the court is considering reinstatement of the rejected offer. *Id*.

at 417, 10 P.3d at 1204.

However, the trial court cannot order reinstatement of a lapsed plea offer simply because defense counsel has engaged in excusable neglect; the petitioner must show prejudice. *State ex rel. Thomas v. Reyes*, 214 Ariz. 411, 413, 153 P.3d 1040, 1042 (2007).

e. Factors to Consider

Prosecutors responding to post-conviction motions that allege a 32.1(a) violation should note the following issues:

1. What does the petitioner allege violated his right(s)?

2. Did the petitioner use current Arizona standards in proving his allegations?

3. Did the petitioner prove the allegations?

4. Was the record sufficiently complete to support petitioner's allegations?

5. If petitioner proved his allegations, did this affect the outcome or was it harmless?

f. Cases: Non-Colorable Ineffective Counsel Claim

State v. Pruett, 185 Ariz. 128, 131, 912 P.2d 1357, 1360 (App. Div. 1 1995). A defendant is constitutionally entitled to effective assistance of counsel on the first petition for post-conviction relief. As a result of this decision, Rule 32.4 was amended in 2000 to allow the petitioner 30 days to file a second notice if he seeks to challenge his attorney's effectiveness in the Rule 32 of-right proceeding. Rule 32.4, comment.

State v. Rosario, 195 Ariz. 264, 266, 987 P.2d 226, 228 (App. Div. 1 1999). Petitioner's claim that his attorney did not explain the plea agreement to him is not a colorable claim where the record indicates he signed the agreement and admitted to the court at his change-of-plea hearing that he read and understood the agreement and the rights he was waiving.

State v. Andersen, 177 Ariz. 381, 386, 868 P.2d 964, 969 (App. Div. 1 1993). Counsel was not ineffective for failing to call a witness who knew that the victim had weapons because there was no evidence that he was attempting to use deadly force against the defendant. Thus, he would not have been entitled to a justification defense.

State v. Morales, 170 Ariz. 360, 365, 824 P.2d 756, 761 (App. Div. 2 1991). Petitioner claimed that counsel was ineffective for failing to present mitigating testimony that he suffered from PTSD as a result of his military service. The fact was mentioned in the pre-sentence report. Difference was amount of detail. Trial court said it would not have made a difference in sentence.

State v. Van Den Berg, Ariz. 192, 196, 791 P.2d 1075, 1079 (App. Div. 1 1990). It is not ineffective assistance of counsel to rely upon the prosecutor’s representation that the state’s witnesses did not have juvenile records.

Nix v. Whiteside, 475 U.S. 157, 106 S.Ct. 988 (1986). A petitioner cannot establish an ineffective assistance of counsel claim by claiming prejudice when the attorney refuses to go along with the petitioner's decision to perjure himself on the stand.

Boag v. Raines, 769 F.2d 1341 (9th Cir. 1985). Counsel was effective even though she did not raise meritless claims that the petitioner would have liked raised.

State v. Santanna, 153 Ariz. 147, 735 P.2d 757 (1987). Counsel was effective even though counsel failed to introduce the issue of self-defense. The petitioner claimed he was not at the murder scene.

State v. Lucas, 146 Ariz. 597, 708 P.2d 81 (1985). Counsel was effective even though he failed to use 10-year-old prior convictions to impeach a witness and failed to object to prosecutor's closing argument referring to defendant's story as a "snow job."

State v. Gerlauqh, 144 Ariz. 449, 465, 698 P.2d 694, 710 (1985). Disagreement with the petitioner in trial strategy will not support an ineffectiveness claim. Counsel was effective at the "critical stage" of sentencing and did not act as neutral observer where counsel challenged aggravating circumstance and offered mitigating circumstances in this death penalty case.

State v. Borbon, 146 Ariz. 392, 706 P.2d 718 (1985). Challenge to counsel's effectiveness for failure to interview witnesses was strongly countered by arresting officer's testimony, therefore, evidentiary hearing was properly denied as frivolous.

State v. Rossi, 146 Ariz. 359, 706 P.2d 371 (1985). Counsel's failure to point out mitigating facts was not a problem because the judge was fully apprised of the arguments in favor of mitigation.

State v. Smith, 140 Ariz. 355, 681 P.2d 1374 (1984), *appeal after remand* 146 Ariz. 325, 705 P.2d 1376 (1984). The outcome is not considered in determining effectiveness of counsel. Counsel prepared an effective case after interviewing the defendant for only 2 or 3 hours and spending 6 to 8 hours studying the case.

State v. Vasquez, 142 Ariz. 527, 530, 690 P.2d 1240, 1243 (App. Div. 1 1984). Petitioner failed to raise a colorable claim of ineffective assistance of counsel where he did not show how counsel's decision not to file a supplemental petition prejudiced the petitioner. Petitioner must show what issues counsel could or should have raised in an amended petition for post-conviction relief.

g. Cases: Colorable Claims of Ineffective Counsel

State v. Donald, 198 Ariz. 406, 413-14, 10 P.3d 1193, 1200-01 (App. Div. 1 2000). Petitioner raised a colorable claim where he rejected a plea offer for “soft time” based on erroneous advice from counsel. He filed an affidavit saying he would have accepted the offer if he had known about it because he faced “flat time” after trial.

State v. Rosario, 195 Ariz. 264, 269, 987 P.2d 226, 230 (App. Div. 1 1999). Petitioner raised a colorable claim where he was erroneously informed by counsel and the court that he would be eligible for parole after having served half of his sentence.

State v. Pac, 175 Ariz. 189, 192, 854 P.2d 1175, 1178 (App. Div. 1 1993). Petitioner did not raise a colorable claim of ineffective assistance of counsel for failing to inform petitioner of eligibility for earned release credit where the failure to be so informed does not render a guilty plea involuntary.

State v. Bowers, 192 Ariz. 419, 424, 966 P.2d 1023, 1028 (App. Div. 1 1998). Counsel's erroneous advice that convictions on petitioner's armed robbery charges would have to be served consecutively constituted a colorable claim of ineffective assistance because the advice induced the petitioner to plead guilty so that he would have a chance at release sometime in his lifetime.

State v. Fisher, 152 Ariz. 116, 120, 730 P.2d 825, 829 (1986). Counsel's failure to interview crucial potential witnesses who may have testified that someone else committed the crime and his reliance on

oral argument alone to assert that theory prejudiced the petitioner.

State v. Sutton, 143 Ariz. 234, 693 P.2d 377 (App. Div. 1 1984). Sufficient facts were alleged for ineffective assistance of counsel claim where presumptive sentence was 11.5 years and counsel told the petitioner that the presumptive sentence was 28 years. The wrong advice by counsel affected the petitioner's decision to plead guilty.

State v. Lee, 142 Ariz. 210, 689 P.2d 153 (1984). Counsel was ineffective where counsel mistakenly acquiesced and called two witnesses whom he believed would commit perjury, then waived final argument on the mistaken belief counsel was obligated to argue the perjury.

2. Rule 32.1(b) & (c) - Collateral Attacks on Judgment or Sentence

Rule 32.1(b) is the universally recognized collateral attack on jurisdiction and 32.1(c) allows an attack on the sentence without contesting the validity of the underlying conviction. Rule 32.1(b),(c), comment.

There is little case law on attack of jurisdiction. More common than the lack of jurisdiction claim is the allegation that the "sentence imposed exceeded the maximum authorized by law, or is otherwise not in accordance with the sentence authorized by law." Rule 32.1(c). This provision allows petitioners to attack a sentence without challenging the conviction. It is the proper avenue for review of an allegedly illegal sentence imposed after admission of a probation violation. *State v. Baca*, 187 Ariz. 61, 926 P.2d 528 (App. Div. 1 1996).

The court will modify or vacate a sentence where the sentence appears clearly excessive under the circumstances. *State v. Cagle*, 124 Ariz. 276, 279, 603 P.2d 547, 550 (App. Div. 2 1979). Moreover, a sentence may be set aside if the reviewing court finds the trial court acted arbitrarily or capriciously or failed to adequately investigate the facts relevant to sentencing. *State v. Cazares*, 205 Ariz. 425, 72 P.3d 355 (App. Div. 2 2003).

In *State v. Pike*, 133 Ariz. 178, 650 P.2d 480 (App. Div. 1 1982), the petitioner failed to attack his sentence under Rule 32.1 (b) or (c). However, the trial court reduced the sentence because the petitioner claimed he had been rehabilitated. The appellate court found the trial court was without jurisdiction to reduce a lawfully imposed sentence that had been affirmed and there was no constitutional violation for a Rule 32.1 (a) claim. *Id*.

Proper Rule 32.1(c) claims do not include a review of a court's order permitting the petitioner to reject probation imposed as part of a stipulated sentence (*Demarce v. Willrich*, 203 Ariz. 502, 56 P.3d 76 (App. Div.1 2002)) or setting aside a statutorily imposed sentence (*State v. Zebrowski*, 24 Ariz.App. 452, 539 P.2d 926 (App. Div.2 1975)).

Prosecutors responding to Rule 32.1(b) or (c) motions, should note the following issues:

1. What sentence did the court impose?

2. What evidence did the petitioner supply to support his claim?

3. Was the sentence imposed within the statutory range?

4. If so, what did the court use as aggravation/mitigation factors?

3. Rule 32.1(d) – Held in Custody

Rule 32.1(d) is not meant to allow attacks on the conditions of imprisonment or correctional facility practices; rather, it is for such matters as miscalculated sentence and computation of good time. *State v. Davis*, 148 Ariz. 62, 65, 712 P.2d 975, 978 (App. Div. 1 1985). The petitioner cannot attack the validity of parole revocation under this Rule. *State v. Manning*, 143 Ariz. 139, 140-41, 692 P.2d 318, 319-20 (App. Div. 1 1984).

4. Rule 32.1(e) - Newly Discovered Evidence

Newly discovered evidence claims are abundant. Even though the newly discovered evidence must have a likelihood of changing the verdict, the defendants continually bring these petitions raising "new" evidence.

> In order for relief to be granted because of newly discovered evidence, the material introduced would have to satisfy five requirements: (1) it must truly be newly discovered, i.e., discovered after the trial; (2) the record must contain facts from which the court can infer due diligence; (3) the evidence must not be merely cumulative or impeaching [unless the impeachment evidence substantially undermines testimony which was of critical significance at trial]; (4) it must be material to the issues involved; and (5) it must be evidence that would *probably* change the verdict if a new trial was ordered.

State v. Jeffers, 135 Ariz. 404, 426, 661 P.2d 1105, 1127 (1983); Rule 32.1(e). Mere conjecture or a possibility that the proffered testimony would affect the verdict is insufficient to warrant a new trial. *Id*.

Newly discovered evidence must appear on its face to have existed at the time of trial, but was discovered after the trial. *State v. Cooper*, 166 Ariz. 126, 800 P.2d 992 (App. Div. 1 1990). The petitioner has the burden of proving that the "new" evidence could not have been found at trial. *State v. Fisher*, 141 Ariz. 227, 251, 686 P.2d 750, 774 (1984). Evidence will not be considered newly-discovered where the petitioner was aware of it but did not inform his attorney. *State v. Saenz*, 197 Ariz. 487, 490, 4 P.3d 1030, 1033 (App. Div. 2 2000).

Moreover, evidence is not considered newly discovered when a petitioner "who voluntarily chooses not to testify comes forward later to offer testimony exculpating a co-defendant." *State v. Dunlap*, Ariz. 441, 466, 930 P.2d 518, 543 (App. Div. 1 1996). "Furthermore, a new witness who chose not to testify based on an attorney's advice was not prevented from testifying for purposes of the newly-discovered evidence requirement." *Id*.

In regards to a pleading defendant, Rule 32 is applied restrictively to overturn guilty pleas because the purpose of plea bargaining would be undermined by allowing a party to later recant and withdraw from a guilty plea. *State v. McFord*, 125 Ariz. 377, 379, 609 P.2d 1077, 1079 (App. Div. 1 1980). Nevertheless, in "an *Alford* plea situation, the factual basis provided by the state becomes all important, as its strength is the primary inducement for the plea. When the newly discovered evidence removes the underpinnings for such a factual basis … the trial court may properly consider such evidence" in a PCR proceeding. *State v. Fritz*, 157 Ariz. 139, 141, 755 P.2d 444, 446 (App. Div. 1 1988).

a. Impeachment Evidence

Evidence that is merely cumulative or impeaching will generally be insufficient to support a newly discovered evidence claim. *See Jeffers*, 135 Ariz. at 427, 661 P.2d at 1128. The evidence must have a probability of changing the verdict, that is, it must appear probable that admission of the new evidence would have changed the result of the trial. *State v. Mann*, 117 Ariz. 517, 520, 573 P.2d 917,920 (App.

Div. 1 1977).

If the evidence is merely a witness recanting or changing her statement, the court must find that witness credible before granting relief because there is "no form of proof as unreliable as recanting testimony." *State v. Fisher*, 141 Ariz. 227, 251, 686 P.2d 750, 774 (1984). Nevertheless, it should be noted that the Rule does not contemplate a complete prohibition against recanting witness testimony. The Rule provides that:

> Impeachment evidence will rarely be of a type which would probably have changed the verdict at trial. However, where newly-discovered impeachment evidence substantially undermines testimony which was of critical significance at trial, the court should evaluate whether relief should be granted on the grounds that the evidence probably would have changed the result. Dicta in cases such as *State v. Fisher*, 141 Ariz. 227, 250-51, 686 P.2d 750, cert. denied , 469 U.S. 1066, 105 S.Ct. 548, 83 L.Ed.2d 436 (1984), suggesting that a defendant will always be barred from relief if newly-discovered evidence is solely for impeachment, have never been incorporated into the Arizona Rules of Criminal Procedure and should not preclude relief deemed necessary in the court's discretion to avoid a miscarriage of justice.

Rule 32.1(e), comment (1992 amendments).

Third party affidavits are impeachment evidence. *State v. Wagstaff*, 161 Ariz. 66, 72, 775 P.2d 1130, 1136 (App. Div. 1 1988). Because third party affidavits show no personal knowledge, they will seldom entitle a petitioner to Rule 32 relief or an evidentiary hearing on their own. *State v. Krum*, 183 Ariz. 288, 293, 903 P.2d 596, 601 (1995). If "an affidavit appears particularly credible or reliable, or if other evidence tends to support the affidavit or the recantation, a trial court should order an evidentiary hearing." *Id*. at 294, 903 P.2d at 602. Affidavits that are conclusory and completely lacking in factual detail will not support a request for an evidentiary hearing. *Id*.

b. Factors to Consider

The prosecutor should consider the following factors when responding to a newly discovered evidence claim:

1. Was the evidence material enough to change the verdict?

2. Did the defense counsel attempt to discover the evidence before trial? if yes:

   a. What investigative techniques were available and actually utilized?
   b. How was the evidence finally discovered?
   c. Did the police or prosecutor hinder the investigation?
   d. How soon after discovery did the defendant file a petition?

c. Cases: Colorable Claims of Newly Discovered Evidence

State v. Orantez, 183 Ariz. 218, 223, 902 P.2d 824, 829 (1995). Although perjurious testimony by a witness does not automatically result in a new trial, the complaining witness' intoxication was admissible to attack her ability to remember; thus, newly discovered evidence of witness' drug use and lying about drug use constituted newly discovered evidence that probably would have changed the verdict at trial.

State v. Ellevan, 179 Ariz. 382, 383, 880 P.2d 139, 140 (App. Div. 1 1994). Petitioner's discovery that he is HIV positive and is unlikely to outlive his sentence is newly-discovered evidence that, if known at the time of sentencing, may have warranted a more lenient sentence. The testimony of his counselor that he possibly contracted the virus before sentencing was sufficient to meet his burden to prove his

claim by a preponderance of the evidence.

State v. Fisher, Ariz. 69, 77-78, 859 P.2d 179, 187-88 (1993). Petitioner made a colorable claim of newly discovered evidence where petitioner's wife's testimony that petitioner was "staggeringly drunk" at the time of the offense was not available at the trial due to an improper consistency provision in her plea agreement.

State v. Van Den Berg, Ariz. 192, 194, 791 P.2d 1075, 1077 (App. Div. 1 1990). Defense counsel's post-trial efforts to uncover a witness' juvenile record constituted due diligence because counsel was entitled to rely on the state's representation that no juvenile records existed.

State v. Bilke, 162 Ariz. 51, 53, 781 P.2d 28, 30 (1989). A post-trial diagnosis that the petitioner suffered from Post-Traumatic Stress Disorder (PTSD) at the time of the offense presented a colorable claim of newly-discovered evidence because it may have affected the sentence imposed.

State v. Jensen, 153 Ariz. 171, 735 P.2d 781 (1987). The petitioner was convicted of two counts of first degree murder in February of 1975. In February of 1984, his Rule 32 petition was granted because of newly discovered evidence. The new evidence was the classification by the American mental health community of PTSD as a diagnostic mental disorder. There was no way the petitioner could have discovered this before the trial. The petitioner presented this evidence at the new trial as a defense to premeditation. He was once again convicted of two counts of first degree murder anyway.

State v. Hickle, 133 Ariz. 234, 237, 650 P.2d 1216, 1219 (1982). Newly discovered evidence indicated that a co-defendant who testified against the defendant lied at trial. This qualified as a material fact and authorized the defendant to institute a Rule 32 petition to secure appropriate relief.

State v. Knapp, 127 Ariz. 65, 618 P.2d 235 (1980). New evidence of wife's guilt did not show petitioner's innocence.

d. Cases: Unsuccessful Claims of Newly Discovered Evidence

State v. Sanchez, 200 Ariz. 163, 166-67, 24 P.3d 610, 613-14 (App. Div. 2 2001). A change in testing procedure by a police laboratory does not constitute newly discovered evidence when the change was made after the petitioner's trial.

State v. Saenz, 197 Ariz. 487, 4 P.3d 1030 (App. Div. 1 2000). Evidence that another person confessed to the crime was not newly discovered where the petitioner was aware of this prior to trial, but did not seek to have the evidence admitted at trial.

State v. Apelt, 176 Ariz. 349, 369, 861 P.2d 634, 654 (1993). Evidence that the murder weapon was wielded by a right handed person, thus eliminating the left-handed petitioner, did not constitute a colorable newly discovered evidence claim where the evidence was overwhelming that the petitioner assisted with the killing in other ways.

State v. Pac, 175 Ariz. 189, 192, 854 P.2d 1175, 1178 (App. Div. 1 1993). The presence in petitioner's trailer park of another person named Jim does not constitute newly-discovered evidence because there was no evidence that the other person was involved in the crime, it would be merely impeaching and the trial court could still have accepted the plea with the knowledge of the other person's existence.

State v. Boldrey, Ariz. 378, 380, 861 P.2d 663, 665 (App. Div. 2 1993). Newly discovered evidence that

the victim has been previously molested by her uncle would not have changed the verdict because of petitioner's admissions and the victim's testimony.

State v. Andersen, 177 Ariz. 381, 387, 868 P.2d 964, 970 (App. Div. 1 1993). Affidavit of witness was not newly discovered evidence where counsel was aware of the witness and interviewed him before trial.

State v. Jeffers, 135 Ariz. 404, 427, 661 P.2d 1105, 1128 (1983). The petitioner knew of the existence and identity of a witness before trial but made no effort to obtain the witness' testimony. Accordingly, that testimony does not justify a new trial.

State v. Dogan, 150 Ariz. 595, 724 P.2d 1264 (App. Div. 2 1986). The petitioner's second Rule 32 petition was not the appropriate place to argue that the photographic line up was unduly prejudicial because the petitioner was the only one wearing a blue denim jacket. This was not newly-discovered evidence and was not argued at the *Dessureault* hearing.

State v. Hankins, 141 Ariz. 217, 686 P.2d 740 (1984). Newly discovered evidence that a codefendant was now willing to testify favorably about the petitioner's intent did not warrant a new trial because the codefendant was serving several prison terms and had nothing to lose by testifying for the petitioner now. *See also State v. Dunlap*, 187 Ariz. 441, 903 P.2d 518 (App. Div. 1 1996).

State v. Linden, 136 Ariz. 129, 664 P.2d 673 (App. Div. 1 1983). A newly discovered immunity agreement between a state's witness and the state was not a basis for new trial because it could merely be used for impeachment, which is not usually a sufficient reason for a new trial.

State v. Littles, 123 Ariz. 427, 430, 600 P.2d 40, 43 (App. Div. 2 1979). Even though victim admitted perjury, the item was of little or no relevance.

State v. Macumber, 119 Ariz. 516, 523-24, 582 P.2d 162, 169-70 (1978). New evidence that people at a party heard no gunshots at the time of crime was not enough for verdict change.

State v. Mann, 117 Ariz. 517, 520, 573 P.2d 917, 920 (App. Div. 1 1977). A perjured witness does not require automatic reversal since it is improbable that new evidence would have changed the verdict.

State v. Nettz, Ariz. 296, 298, 560 P.2d 814, 816 (App. Div. 2 1977). Defects in an order restraining petitioner from taking victim's property did not constitute newly discovered evidence where the order's defects were visible on the face of the order and, thus, easily discoverable by counsel.

5. Rule 32.1(f) - Failure to Appeal Without Fault

If the defendant is not advised of his right to appeal or if defense counsel refuses to follow through on the request, the defendant is not precluded from filing a Rule 32 petition. A.R.S. § 13-4231(7); Rule 32.1(f). The petitioner has the burden of proving that the failure to appeal was not his fault. *State v. Stice*, 23 Ariz.App. 97, 530 P.2d 1130 (App. Div. 1 1975)(petitioner admitted he failed to appeal because he believed his conviction would be removed under A.R.S. S 13-1744, therefore, his failure to appeal was not without fault). The petitioner's counsel cannot waive the right of appeal. *State v. Canedo*, 125 Ariz. 197, 608 P.2d 774 (1980) (defense counsel's filing of appeal in wrong court meant that petitioner's failure to appeal was not his fault). The decision as to whether to waive appeal is within the sole discretion of the defendant. *Id*.

If the court finds the failure to appeal was not defendant's choice or fault, the remedy is a delayed appeal. See generally *State v. Cook*, 150 Ariz. 470, 724 P.2d 556 (1986).

6. Rule 32.1(g) - Significant Change in the Law

A significant change in the law that entitles a petitioner to PCR relief requires the type of change that signifies a "clear break from the past," such as when an appellate court overturns previously binding case law. *State v. Shrum*, 220 Ariz. 115, 118, 203 P.3d 1175, 1178 (2009). "A statutory or constitutional amendment representing a definite break from prior law can also be a significant change in the law." *Id*. at 119, 203 P.3d at 1179. However, an appellate decision that is simply the first to interpret a statute is not a significant change in the law. *Id*. at 120,203 P.3d at 1180.

A new rule will apply to final convictions on collateral review only if it falls within one of two exceptions: (1) rules making certain conduct exempt from the legislature's power to define criminal acts and (2) a watershed rule of criminal procedure that implicates the fundamental fairness of a trial. *State v. Sepulveda*, 201 Ariz. 158, 160, 32 P.3d 1085, 1087 (App. Div. 2 2001).

A petitioner may be entitled to make a claim pursuant to 32.1(g) even though the change occurred before the first PCR petition was filed if a subsequent decision permitting retroactive application of the change in law was filed after petitioner's first PCR was denied. *State v. Bonnell*, 171 Ariz. 435, 438, 831 P.2d 434, 437 (App. Div. 1 1992).

An unpublished opinion may not constitute a significant change in the law because a memorandum opinion has no precedential value. *State v. Smith*, 169 Ariz. 243, 246, 818 P.2d 228, 231 (App. Div. 1 1991).

7. Rule 32.1(h) - Actual Innocence

This subsection is a relatively new addition to Rule 32.1. Accordingly, there is little case law interpreting it. In *State v. Swoopes*, 216 Ariz. 390, 400, 166 P.3d 945, 955 (App. Div. 2 2007), the Arizona Court of Appeals held that a petitioner's allegations of error relating to his identification by witnesses, the trial judge's allegedly improper answer to the jury, or the prosecutor's allegedly improper argument related to that identification amounted to a colorable claim of actual innocence.

III. PROCEDURE

A. After the Petition is Filed

If the petitioner has failed to file a petition that conforms to the Rule, move to have the petition dismissed. After the petition is filed, amendments are not allowed unless the court finds good cause to do so. Rule 32.6(d). *But see* A.R.S. § 13-4236(D)(requires finding of extraordinary circumstances to permit amendment of petition).

The clerk of the superior court will send a copy of the petition to the appropriate appellate court within 5 days if there is an appeal of the petitioner's sentence or conviction (or both) pending. A.R.S. § 13-4234(B); Rule 32.4(b). The proceeding is then assigned to the original sentencing judge if possible. *State ex rel Corbin v. Superior Court*, 138 Ariz. 500, 675 P.2d 1319 (1984) (a local Maricopa County rule conflicted with this Rule by allowing assignment to other than sentencing judge); A.R.S. § 13-4234(c); Rule 32.4(C). The sentencing judge is the judge who is most familiar with the case and is probably in the best position to judge the evidence. *State v. Adamson*, 136 Ariz. 250, 265, 665 P.2d

972, 987 (1983). Of course, the petition must be reassigned if it appears the judge's testimony would be relevant. A.R.S. § 13-4234(C); Rule 32.4(c).

B. Time Limits

After the petitioner files a conforming petition, the prosecutor has 45 days to file the response. A.R.S. § 13-4236(A); Rule 32.6(a). The response must include affidavits, records or other evidence contradicting the allegations in the petition. *Id*. The court may grant one 30 day extension of time to respond but any additional extensions are permissible only upon a showing of extraordinary circumstances. *Id*.

The petitioner has 15 days after receiving the response to reply. A.R.S. § 13-4236(B); Rule 32.6(b). The court may grant an extension of the deadline only upon a showing of extraordinary circumstances. *Id*.

Within 20 days after petitioner's reply is due, the judge can look at the petition, responses, and the record to determine whether any issues are precluded. A.R.S. § 13-4236(C); Rule 32.6(c). If there are no colorable claims, the court shall summarily dismiss the petition. *Id*. There is no remedy for failure of judge to rule in the allotted time. *State v. Cawley*, 133 Ariz. 27, 648 P.2d 142 (App. Div. 2 1982). If the court finds a colorable claim exists, the judge must set a hearing on the matter in 30 days. Rule 32.6(c).

C. Transcripts/Record/Discovery

Upon filing of the notice of post-conviction relief, the court must order relevant transcripts. Rule 32.4(d). Nevertheless, it is the petitioner's responsibility to ensure the record contains the material to which he objects. *State v. Wilson*, 179 Ariz. 17, 19, 875 P.2d 1322, 1324 (App. Div. 1 1993). Courts will presume that material missing from the record supports the decision of the trial court. *Id*., citing *State v. Berge*, 130 Ariz. 135, 136, 634 P.2d 947, 948 (1981).

Rule 32 does not explicitly provide a procedure for a petitioner to obtain discovery from the state. The petitioner is entitled to any clearly exculpatory evidence pursuant to *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963). *Canion v. Cole*, 210 Ariz. 598, 599, 115 P.3d 1261, 1262 (2005). However, the petitioner may not compel discovery under Rule 15.1 at the post-notice, pre-petition stage of PCR proceedings. *Id*. at 599-600, 115 P.3d at 1262-63. Moreover, a petitioner must file a petition first before he may request a judge to use his inherent authority to order discovery. *Id*. at 600, 115 P.3d at 1263. When seeking discovery, the petitioner must show good cause to compel the order. *Id*.

D. Prosecutor's Response

The court will not condone a prosecutor's failure to file a response to a PCR. *State v. Thompson*, 120 Ariz. 202, 203, 584 P.2d 1193, 1194 (App. Div. 1 1978). However, the failure to file a response or to speak in opposition to a petition does not entitle the petitioner to relief. *State v. Cawley*, 133 Ariz. 27, 29, 648 P.2d 142, 144 (App. Div. 2 1982).

E. Has the Petitioner Alleged a Colorable Claim?

The prosecutor should respond to the petition by asking for dismissal if the petitioner failed to state a colorable claim. Before the court can summarily dismiss a claim or grant a hearing, it must be determined whether there is a colorable claim.

A colorable claim is one that has the appearance of validity – in other words, if the allegations are taken as true, would they change the outcome? *State v. Ketchum*, 191 Ariz. 415, 416, 956 P.2d 1237, 1238 (App. Div. 1 1997). If doubt exists whether the petitioner made a colorable claim, the trial court should hold a hearing to allow the petitioner to "raise the relevant issues, to resolve the matter, and to make a record for review." *State v. Donald*, 198 Ariz. 406, 413, 10 P.3d 1193, 1200 (App. Div. 1 2000).

If the trial judge finds that a colorable claim exists, she then sets a full evidentiary hearing within 30 days to evaluate the evidence. A.R.S. § 13-4236(C); Rule 32.6(c). The court may hold an informal conference to expedite the matter; the petitioner need not be present if he has appointed counsel. A.R.S. § 13-4237; Rule 32.7. The informal conference may be used to resolve the matter.

1. Non-Colorable Claims

State v. Verdugo, 183 Ariz. 135, 139, 901 P.2d 1165, 1169 (App. Div. 1 1995). Petitioner failed to allege sufficient facts to make a colorable claim that the court lacked jurisdiction because the crime occurred on an Indian reservation and failed to establish that either he or the victim is an Indian.

State v. Puls, 176 Ariz. 273, 275, 860 P.2d 1326, 1328 (App. Div. 2 1993). Petitioner convicted of unlawful transfer of a narcotic drug did not present colorable claim of newly-discovered evidence that the recipient of the package asked about it numerous times. The evidence could have been interpreted as reinforcing petitioner's culpability instead of exculpating him.

State v. Borbon, 146 Ariz. 392, 706 P.2d 718 (1985). The petitioner did not indicate names of witnesses or what their potential testimony would be, therefore, he did not present a colorable claim of ineffective assistance of counsel for failure to call defense witnesses or allow the petitioner to testify. The petitioner has the burden of supplying the court with the information to support his claims.

State v. Adamson, 136 Ariz. 250, 265, 665 P.2d 972, 987 (1983). The petitioner did not present enough evidence to support a colorable claim of a *Brady* violation (prosecutor withholding evidence) and juror misconduct because the trial judge found "'that there have been no *Brady* violations and that there [was] no newly discovered evidence as proof of any juror misconduct' . . . the trial judge was in a much better position than we are to determine the weight to be given the defendant's claims in his petition and whether or not the allegations taken as true would change the verdict."

State v. Linden, 136 Ariz. 129, 141, 664 P.2d 673, 685. (App. Div. 1 1983). The petitioner asserted that the newly discovered evidence of an agreement between a key witness and the county attorney regarding immunity was a colorable claim. The court did not agree: "To state a 'colorable claim' for relief under Rule 32, the court must determine whether the allegation, if taken as true, would have changed the verdict."

State v. Lemieux, 137 Ariz. 143, 146, 669 P.2d 121, 124 (App. Div. 1 1983). Petitioner's assertion that he thought he would get probation was not supported by record, therefore, no colorable claim.

State v. Thompson, 139 Ariz. 552, 555, 679 P.2d 575, 578 (App. Div. 1 1984). Petitioner did not make specific allegations of ineffective assistance of counsel, therefore, no colorable claim.

State v. Gunter, 132 Ariz. 64, 72, 643 P.2d 1034, 1042 (App. Div. 1 1982). Petitioner made no allegations that his presentence report was not correct at sentencing proceeding, therefore, claim that he was not allowed to correct it was not colorable.

State v. Ramirez, 126 Ariz. 464, 616 P.2d 924 (App. Div. 1 1980). Failure of trial counsel to explore controverted medical testimony was not ineffective assistance of counsel, therefore, no colorable claim.

State v. Moore, 125 Ariz. 528, 611 P.2d 115 (App. Div. 1 1980). If there are no colorable claims it is not proper to file a motion anyway in order to "shotgun" any possible issues.

State v. Browne, 124 Ariz. 482, 605 P.2d 460 (App. Div. 1 1979). There was no evidence that the petitioner's guilty plea was coerced, therefore, no colorable claim.

2. Colorable Claims

State v. Bowers, 192 Ariz. 419, 424, 966 P.2d 1023, 1028 (App. Div. 1 1998). A colorable claim of ineffective assistance of counsel in which the petitioner seeks to withdraw his guilty plea must allege that the petitioner would not have pleaded guilty but for counsel's deficient performance. The claim must be accompanied by an allegation of specific facts which would allow a court to meaningfully assess why that deficiency was material to the plea decision.

State v. Schrock, 149 Ariz. 433, 441, 719 P.2d 1049, 1057 (1986). A hearing was necessary in order to expand the record concerning the prosecutor's interview of the defendant before the sentencing hearing because the defense counsel did not know of the interview and there was no evidence to determine conclusively whether the interview affected the sentence.

State v. Jordan, 137 Ariz. 504, 672 P.2d 169 (1983). The petitioner was entitled to a hearing concerning his colorable claim that the death penalty was erroneously imposed. There was evidence supported by defense counsel's affidavit that the trial judge had indicated that the petitioner would not get the death penalty if he entered a guilty plea to first-degree murder.

F. Summary Disposition

A summary disposition allows the judge to reject meritless, non-colorable claims without further expense to the legal system. See *State v. Suarez*, 23 Ariz.App. 45, 530 P.2d 402 (App. Div. 2 1975). The petitioner's claim must at least have the appearance of validity in order to be colorable. *Id*. The petitioner is "entitled to a hearing [only] when he presents the trial court with a colorable claim, that is a claim which if his allegations are true might have changed the outcome." *State v. Schrock*, 149 Ariz. 433, 441, 719 P.2d 1049, 1057 (1986). Summary disposition is also permitted when there is no material issue of law or fact that would entitle the petitioner to relief. *State v. Andersen*, 177 Ariz. 381, 385, 868 P.2d 964, 968 (App. Div. 1 1993).

G. Necessity for Hearing

The decision to grant or deny relief is within the sound discretion of the trial court. *State v. Bishop*, 137 Ariz. 5, 9, 667 P.2d 1331, 1335 (App. Div. 2 1983); *State v. Adamson*, 136 Ariz. 250, 665 P.2d 972 (1983); *State v. Littles*, 123 Ariz. 427, 600 P.2d 40 (App. Div. 2 1979).

Rule 32.6(c) makes clear that summary disposition is not warranted and “plenary consideration is available” for petitions raising factual and/or legal issues. raising factual issues, legal issues or both. Rule 32.6, comment. “It also instructs the court to make a final adjudication of all the petitioner's claims--those lurking in the background as well as those specified.” *Id*.

In addition to a determination of colorable and precluded claims, the court must also take the

limitations of the Victim's Bill of Rights into consideration when making a decision to grant an evidentiary hearing. *State v. Krum*, 183 Ariz. 288, 293, 903 P.2d 596, 601 (1995)(court had to determine whether to grant hearing regarding recanting victim allegation made through a third party affidavit).

H. Stay of Execution

Rule 32.4(f) pertains to stays of execution while the petition is pending. There are no formal guidelines for superior court judges to follow in determining whether to stay an execution, except in the case where the petitioner has already filed a petition and relief has been denied. The rule provides as follows:

> If the defendant has received a sentence of death and the Supreme Court has fixed the time for execution of the sentence, no stay of execution shall be granted upon the filing of a successive petition except upon separate application for a stay to the Supreme Court, setting forth with particularity those issues not precluded under Rule 32.2. The Clerk of the Supreme Court shall notify the defendant, the Attorney General, and the Director of the State Department of Corrections of the granting of a stay.

Rule 32.4(f). Under A.R.S. § 13-4234(J), the warrant may not be stayed to allow for the filing of a petition.

I. Summary Checklist

This is a checklist to follow when responding to the Rule 32 petition:

1. Were the time limits followed?
2. Was the substance of Rule 32 followed, viz.:
   a. Was there a colorable claim?
   b. Did the petitioner assert every ground for relief known at that time?
   c. Did the petitioner distinguish personal knowledge from facts?
   d. Did the petitioner include affidavits, documents and evidence supporting his assertions?
3. Is there an appeal pending?
4. If the appeal was already decided, does it bar the present Rule 32 motion?
5. Is the judge the proper one to hear the case?

IV. PRECLUSION

Rule 32.2(a) precludes relief on a ground that either was or could have been raised on direct appeal or in a previous PCR proceeding in order to "prevent endless or nearly endless reviews of the same case in the same trial court." *State v. Shrum*, 220 Ariz. 115, 118, 203 P.3d 1175, 1178 (2009), *citing Stewart v. Smith*, 202 Ariz. 446, 450 ¶ 11, 46 P.3d 1067, 1071 (2002). "By requiring that all post-conviction claims be raised promptly, Rule 32.2(a) not only serves important principles of finality, but also allows any relief to be issued at a time when the interests of justice, from the perspectives of the defendant, the State, and the victim, can be best served." *Id*.

A. Rule 32.2

Rule 32.2 states:

> a. Preclusion. A defendant shall be precluded from relief under this rule based upon any ground:
>
> 1) Raisable on direct appeal under Rule 31 or on post-trial motion under Rule 24;
> 2) Finally adjudicated on the merits on appeal or in any previous collateral proceeding;
> 3) That has been waived at trial, on appeal, or in any previous collateral proceeding.
>
> b. Exceptions. Rule 32.2 shall not apply to claims based on Rules 32.1(d),(e) (f), (g) and (h). When a claim under Rules 32.1(d), (e), (f), (g) and (h) is to be raised in a successive or untimely post-conviction relief proceeding, the notice of post-conviction relief must set forth the substance of the specific exception and the reasons for not raising the claim in the previous petition or in a timely manner. If the specific exception and meritorious reasons do not appear substantiating the claim and indicating why the claim was not stated in the previous petition or in a timely manner, the notice shall be summarily dismissed.
>
> c. Standard of Proof. The state shall plead and prove any ground of preclusion by a preponderance of the evidence. Though the state has the burden to plead and prove grounds of preclusion, any court on review of the record may determine and hold that an issue is precluded regardless of whether the state raises preclusion.

The exceptions in Rule 32.2(b) are expired sentences, newly discovered evidence, failure to file appeal, change in the law and actual innocence. The prosecutor must plead and prove preclusion by a preponderance of the evidence. *State v. Thompson*, 120 Ariz. 202, 203, 584 P.2d 1193, 1194 (App. Div. 1 1978); A.R.S. § 13-4232(C); Rule 32.2(c). However, the court may raise preclusion *sua sponte* if the state failed to raise the issue. A.R.S. § 13-4232(c); *State v. Espinosa*, 200 Ariz. 503, 505-505, 29 P.3d 278, 279-80 (App. Div. 2 2001). The court may also summarily deny a PCR on preclusion grounds before the state files a response. *State v. Curtis*, 185 Ariz. 112, 113, 912 P.2d 1341, 1342 (App. Div. 1 1995).

Nevertheless, the courts do not appreciate being overloaded with these petitions and the prosecutors should be mindful to plead preclusion in order to avoid annoying the courts. *State v. Thompson*, 139 Ariz. 552, 555, 679 P.2d 575, 578 (App. Div. 1 1984). Pleading preclusion is a quick way to get the petition out of the way. However, with the three exceptions there will be plenty of second and third (and fourth and fifth) petitions.

B. Waivable Issues

The petitioner is precluded from raising an issue in a PCR petition if the issue is still 1) raisable on appeal, 2) has already been decided or 3) has already been waived at trial, on appeal, or in any other collateral proceeding. Rule 32.2(a). "Our basic rule is that where ineffective assistance of counsel claims are raised, or could have been raised, in a Rule 32 post-conviction relief proceeding, subsequent claims of ineffective assistance will be deemed waived and precluded." *State v. Spreitz*, 202 Ariz. 1, 39 P.3d 525 (2002)(emphasis in original). Appellate courts will no longer address ineffective assistance of counsel claims raised on direct appeal and the mere raising of such issues will not have a preclusive effect in Rule 32 proceedings. *Id*. at 3, 39 P.3d at 527.

> [S]ome issues not raised at trial, on appeal, or in a previous collateral proceeding may be deemed waived without considering the defendant's personal knowledge, unless such knowledge is specifically required to waive the constitutional right involved. If an asserted claim is of sufficient constitutional magnitude, the state must show that the

> defendant 'knowingly, voluntarily and intelligently' waived the claim. For most claims of trial error, the state may simply show that the defendant did not raise the error at trial, on appeal, or in a previous collateral proceeding, and that would be sufficient to show that the defendant has waived the claim.

Rule 32.2, comment. "[W]hether an asserted ground is of 'sufficient constitutional magnitude' to require a knowing, voluntary and intelligent waiver for purposes of Rule 32.2(a)(3) does not depend upon the merits of the particular ground. It depends merely upon the particular right alleged to have been violated." *Stewart v. Smith*, 202 Ariz. 446, 450, 46 P.3d 1067, 1071 (2002). Preclusion does not apply to claims involving such constitutional rights such as the right to counsel, the right to a jury trial, or the right to a twelve-person jury, "unless the record establishes that the defendant has knowingly, voluntarily, and intelligently waived the right." *State v. Espinosa*, 200 Ariz. 503, 505, 29 P.3d 278, 280 (App. Div. 2 2001). However, if the claim implicates a less significant constitutional right, "the state may simply show that the defendant did not raise the error at trial ... and that would be sufficient to show that the defendant has waived the claim." *Id*. citing Rule 32.2(a)(3), comment. The right to be present for certain court proceedings is one example of a minor right that can be subject to preclusion. *State v. Swoopes*, 216 Ariz. 390, 400, 166 P.3d 945, 955 (App. Div. 2 2007).

If the petitioner obviously knows of grounds for relief and does not raise them on appeal or in a Rule 32 Petition, he cannot raise them in a second petition. *State v. Gaffney*, 121 Ariz. 271, 589 P.2d 914 (App. Div. 1 1979) (petitioner knew of his sentence and that he was not guilty when pled guilty during his permissible appeal period and when he filed his first petition). The petitioner cannot circumvent preclusion by arguing his failure to raise precluded issues was itself due to ineffective assistance of counsel without support for that separate claim. To do so would strip Rule 32.2(a)(3) of its effect. *State v. Curtis*, 185 Ariz. 112, 116, 912 P.2d 1341, 1345 (App. Div. 1 1995). Similarly, a petitioner cannot overcome the inference of waiver merely by claiming to have been previously unaware of his claim. *State v. Wilson*,179 Ariz. 17, 20 n.2, 875 P.2d 1322, 1325 n.2 (App. Div. 1 1993). "In the instances where petitioners have overcome the inference of waiver, they have shown that they are entitled to Rule 32 review by more than just their own self-serving assertions. *Compare State v. Coleman*, 152 Ariz. 583, 585, 733 P.2d 1166, 1168 (App. 1987)(petitioner overcame inference of waiver where record indicated that he was unaware of necessity of raising issue by direct appeal) *with State v. Smith*, 169 Ariz. 243, 247, 818 P.2d 228, 232 (App.1991) (petitioner did not overcome inference of waiver by assertion of ignorance where record was made available to him at time of direct appeal)." *Id*.

C. Cases

1. Raisable on Appeal

State v. Berryman, 178 Ariz. 617, 624, 875 P.2d 850, 857 (App. Div. 1 1994). The petitioner's claim that his sentence was improperly enhanced by a prior conviction was precluded by his failure to raise it in the direct appeal.

State v. Gortarez, 141 Ariz. 254, 262, 686 P.2d 1224, 1232 (1984). The trial court properly dismissed the petition that raised issues of perjured grand jury testimony, ineffective assistance of counsel, and unconstitutional amendment of the indictment, because all of the issues were properly preserved for appeal and should not be heard for the first time in a Rule 32 petition.

2. Already Decided

State v. Curtis, 185 Ariz. 112, 115, 912 P.2d 1341, 1344 (App. Div. 1 1995). A due process issue regarding the absence of a lesser-included offense jury instruction was precluded because the appellate

court found no evidence to support such an instruction on the direct appeal.

State v. Tison, 142 Ariz. 454, 690 P.2d 755 (1984), *vacated on other grounds*, 481 U.S. 137,107 S.Ct. 1676 (1987). The court properly denied the petitioner's petition based on ineffective assistance of counsel because the petitioner had raised that issue on appeal and it had already been adjudicated that counsel was adequate. But see *State v. Spreitz*, 202 Ariz. 1, 39 P.3d 525 (2002) (appellate courts will no longer consider ineffective assistance claims on direct appeal).

3. Waiver

State v. Bennett, 213 Ariz. 562, 566-67, 146 P.3d 63, 67-68 (2006). Petitioner's ineffective assistance of appellate counsel claim was not precluded in second PCR because appellate counsel represented petitioner in simultaneous direct appeal and first PCR.

State v. Espinosa, 200 Ariz. 503, 505, 29 P.3d 278, 280 (App. Div. 2 2001). The propriety of the state's withdrawal of a plea offer was not an issue of sufficient constitutional magnitude that it required a knowing and intelligent waiver before preclusion applied. Thus, petitioner's failure to object to the withdrawal of the offer waived the issue for PCR proceedings.

State v. Mata, 185 Ariz. 319, 335, 916 P.2d 1035, 1051 (1996). A statement on a prior PCR form advising petitioner that the failure to raise every known issue would lead to preclusion was sufficient to demonstrate an inference of waiver.

State v. Wilson, 185 Ariz. 128, 130 n.2, 912 P.2d 1357, 1359 n.2 (App. Div. 1 1995). Generally, an appellate counsel's waiver of other issues on appeal binds a defendant. Waived issues cannot be resurrected in a subsequent post-conviction proceeding. However, a defendant may raise ineffective assistance of appellate counsel on subsequent petition for failure to raise a claim on direct appeal. See also *State v. Bennett*, 213 Ariz. 562, 566, 146 P.3d 63, 67 (2006).

State v. Curtis, 185 Ariz. 112, 115, 912 P.2d 1341, 1344 (App. Div. 1 1995). Petitioner's claim that a jury instruction denied him due process was precluded for lack of "sufficient constitutional magnitude" when presented in a second PCR after the court reviewed the record for fundamental error in the direct appeal, which would have covered the jury instructions.

State v. Hursey, 176 Ariz. 330, 332, 861 P.2d 615, 617 (1993). Petitioner was not precluded from raising issue of prosecutor's disqualification in a subsequent PCR.

State v. Bonnell, 171 Ariz. 435, 437, 831 P.2d 434, 436 (App. Div. 1 1992). The exception to preclusion in Rule 32.2(b) can be applied to Rule 32.10 because that exception is a reasonable ground to excuse the failure to previously state a claim.

State v. Coleman, 152 Ariz. 583, 585, 733 P.2d 1166, 1168 (App. Div. 1 1987). The trial court can infer a waiver when the petitioner fails to appeal after being told of the necessity to do so by the sentencing judge. The petitioner was unaware that he would have to appeal his guilty plea, therefore, he was allowed to attack the validity of his guilty plea in his first Rule 32 petition.

State v. Grier, 146 Ariz. 511, 514, 707 P.2d 309, 312 (1985). The petitioner could have and should have raised the issue of ineffective assistance of counsel in an earlier proceeding, therefore, he was effectively precluded from raising the issue in his second Rule 32 petition.

State v. Vasquez, 142 Ariz. 527, 530, 690 P.2d 1240, 1243 (App. Div. 1 1984). The petitioner's failure to argue certain claims previously raised in motion supporting petition was deemed waiver of those claims.

State v. Walden, 126 Ariz. 333, 336, 615 P.2d 11, 15 (App. Div. 1 1980). The petitioner failed to assert that his presentence report was incomplete at his sentencing hearing, therefore, he was precluded from raising the issue in his Rule 32 petition.

V. THE HEARING

A. Rule 32.8

The Rule 32.8 hearing is a full evidentiary hearing to determine all issues of material fact. The hearing may be held at the petitioner's place of confinement, if the facility is given at least 15 days' notice. A.R.S. § 13-4238(A); Rule 32.8(a). The court has discretion in determining the place of hearing; therefore, the petitioner cannot demand a hearing at the state prison. *State v. Daniel*, 25 Ariz.App. 592, 594, 545 P.2d 440, 442 (App. Div. 2 1976).

B. Evidence and Burden of Proof

The rules of evidence are applicable during the hearing except that the petitioner may be called to testify. A.R.S. § 13-4238(B); Rule 32.8(b). The petitioner must prove the allegations by a preponderance of the evidence and the prosecutor must prove beyond a reasonable doubt that any constitutional defects were harmless. Rule 32.8(c); *State v. Byers*, 126 Ariz. 139, 141, 613 P.2d 299 (App. Div. 1 1980) (petitioner did not sustain his burden of proving that his guilty plea was induced by his trial counsel's promise petitioner would only to jail for 60 days), *overruled on other grounds in State v. Pope*, 130 Ariz. 253, 635 P.2d 846 (1981). The petitioner's presence is required at the evidentiary hearing, and he has the right to subpoena witnesses to appear on his behalf. *Townsend v. Sain*, 372 U.S. 293, 83 S.Ct. 745 (1963).

The court has 10 days after the hearing to rule unless the volume of the evidence or the complexity of the issues requires more time. A.R.S. § 13-4238(D); Rule 32.8(d). There is no sanction for failure to rule in ten days as long as the petitioner is not prejudiced. *State v. Cawley*, 133 Ariz. 27, 648 P.2d 142 (App. Div. 2 1982).

Because the trial judge is in the best position to weigh the evidence, he should be given broad discretion. *State v. Cramer*, 192 Ariz. 150, 152, 962 P.2d 224, 226 (App. Div. 1 1998) and *State v. Bishop*, 137 Ariz. 5, 9, 667 P.2d 1331, 1335 (App. Div. 2 1983).

In *State v. Jaramillo*, 152 Ariz. 394, 733 P.2d 279, (1987), the trial judge properly granted an evidentiary hearing after the defendant alleged that he had ingested 14 benadryl tablets before the change-of-plea hearing. The mere granting of an evidentiary hearing does not guarantee relief. The petitioner received no relief because he was thoroughly informed of the consequences of accepting the plea agreement and chose to plead guilty anyway. *Id*. "Evidence is nonexistent as to why the trial judge would have granted defendant's request to withdraw his plea. Defendant's ineffective-assistance-of counsel argument is meritless." *Id.* at 156, 733 P.2d at 283.

If the court finds in favor of the petitioner, it must enter an order "with respect to the conviction, sentence or detention, any further proceedings, including a new trial and conditions of release, and other matters that may be necessary and proper." Rule 32.8(d). Moreover, the court is required to make

specific findings of fact and state conclusions of law on each issue. *Id*. The appellate court may remand the case to the trial court for entry of specific findings of fact if the appellate court believes it cannot effectively analyze the petition in their absence. *State v. Tankersley*, 211 Ariz. 323, 121 P.3d 829 (2005).

VI. REVIEW

A. Motion for Rehearing

Either party may move the court within 15 days for rehearing if he is not satisfied with the final decision. A.R.S. § 13-4239(A); Rule 32.9(a). The trial court may allow late filing if there is a valid reason for it. *State v. Pope*, 130 Ariz. 253, 255, 635 P.2d 846, 848 (1981) (the failure of defense counsel's secretary to transmit the order denying relief to the petitioner is a valid reason). See also *State v. Grange*, 130 Ariz. 250, 252, 635 P.2d 843, 845 (1981)(petitioner's filing of motion directly with out-of-county judge who heard the case instead of the county clerk where case was heard was a valid reason for late filing). The time limit to file a motion for rehearing or a petition for review is extended by five days when service is made by mail and begins to run upon mailing of service. *State v. Byers*, 126 Ariz. 139, 141, 613 P.2d 299, 301, (App. Div.1 1980), overruled on other grounds by *State v. Pope*, 130 Ariz. 253, 635 P.2d 846 (1981).

If the court requests a response, the opponent has fifteen days to file a response, then the movant has ten days to file a reply. A.R.S. § 13-4239(A); Rule 32.9(a). The court may grant the motion for rehearing and then has the choice of amending its previous ruling without hearing or granting a new hearing. A.R.S. § 13-4239(B); Rule 32.9(b).

The motion for rehearing must set forth in detail all the areas wherein the court erred. Rule 32.9(a); A.R.S. § 13-4239(A). Merely reiterating the original allegations or making new allegations is insufficient, and review will not be granted. *State v. Ramirez*, 126 Ariz. 464, 467, 616 P.2d 924, 927 (App. Div. 1 1980). A petitioner is not entitled to raise a new issue for review that had not been raised in the original petition. *Id.* "Normally, this court will consider only those issues stated within particularity in the motion for rehearing." *State v. Thompson*, 139 Ariz. 552, 554, 679 P.2d 575, 577 (App. Div. 1 1984). The filing of a motion for rehearing does not limit the issues that may be raised in the petition or the cross-petition for review. Rule 32.9(c)(1).

B. Petition for Review

The aggrieved party has thirty days from the final decision on the PCR or the motion for rehearing to file a petition for review in the appropriate appellate court. A.R.S. § 13-4239(C); Rule 32.9(c). Within three days of the filing, the party must file a notice of the petition for review in the trial court. *Id*. New matters may not be raised in the petition for review. *State v. Ramirez*, 126 Ariz. 464, 616 P.2d 924 (App. Div. 1 1980). A cross-petition may be filed within 15 days of service of the petition for review. Rule 32.9(c).

Victims are not aggrieved parties with right to file their own petition for review of a trial court's decision to grant or deny post-conviction relief. *State v. Lamberton*, 183 Ariz. 47, 49, 899 P.2d 939, 941 (1995).

A petitioner is not entitled to appointment of counsel on a petition for review. *State v. Smith*, 184 Ariz.

456, 458, 910 P.2d 1, 3 (1996).

1. Form of the Petition and Responses

The petition or cross-petition must comply with Rule 31.12 regarding the form of direct appeals. Rule 32.9(c)(1). If the petition for review is filed in superior court, an original and one copy must be filed. *Id*. The petition or cross-petition must not be longer than 20 pages, exclusive of the appendix. *Id*. An appendix is not required in Rule 32 of-right and non-capital cases, but the petition for review must contain specific references to the record. *Id*. The petitioner or cross-petitioner shall serve a copy of the petition or cross-petition on the adverse party. Rule 32.9(c)(2).

A response to a petition or cross-petition for review may be filed within 30 days from the date the petition or cross-petition is served. *Id*. The response and appendices must comply with the same form requirements as the petition and cannot exceed 20 pages, exclusive of any appendix. *Id*. A reply may be filed within 10 days after service of the response, must comply with the form requirements of Rule 32.9(c)(1), shall be limited to matters addressed in the response, shall not exceed 10 pages, and cannot have appendices. *Id*.

2. Contents of the Petition

The petition or cross-petition for review must contain the following:

> (i) Copies of the trial court's rulings entered pursuant to rules 32.6(c), 32.8(d) and 32.9(b).
> (ii) The issues which were decided by the trial court and which the defendant wishes to present to the appellate court for review.
> (iii) The facts material to a consideration of the issues presented for review.
> (iv) The reasons why the petition should be granted. In capital cases all references to the record in the trial court shall be supported by an appendix, with appropriate copies of the portions of the record which support the petition. The petition shall not incorporate any document by reference, except the appendices. If the appendices exclusive of the trial court's rulings exceed 15 pages in length, such appendices shall be fastened together separately from the petition and the copies of the trial court's rulings.

Rule 32.9(c)(1) (emphasis added). If an aggrieved party fails to raise any issue that could be raised in the petition or the cross-petition for review, that issue will be waived. *Id*. Moreover, if the aggrieved party fails to conform his petition to the requirements of the rule, the appellate court will not address those claims. *State v. French*, 198 Ariz. 119, 122, 7 P.3d 128, 131 (App. Div. 2 2000), *disapproved of on other grounds in Stewart v. Smith*, 202 Ariz. 446, 46 P.3d 1067 (2002)(petitioner's petition for review merely referred to memoranda filed in the trial court and incorporated them by reference).

3. Standard of Review

Ordinarily, the appellate court reviews a trial court's denial of post-conviction relief for an abuse of discretion. *State v. Decenzo*, 199 Ariz. 355, 356, 18 P.3d 149, 150 (App. Div. 2 2001). However, if a claim hinges on the interpretation of a statute, the court will review the claim will be reviewed de novo. *Id*. Although a PCR of-right petition is the equivalent of a direct appeal for pleading defendants, the appellate court will not conduct a fundamental error review of a petition for review. *State v. Smith*, 184 Ariz. 456, 459, 910 P.2d 1, 4 (1996).

C. Record on Review

In non-capital cases, the trial record must be transmitted to the appellate court within 45 days. A.R.S. § 13-4239(D); Rule 32.9(d). Transmission of the PCR record in capital cases is not permitted unless requested by the appellate court. *Id*. Because briefs are not filed in the appellate court in review proceedings, "the record to be transmitted by the clerk of the Court of Appeals pursuant to Rule 31.19(d) must include the motion for rehearing and response filed by the parties in the Superior Court in the post-conviction relief proceeding." Rule 32.9(d), comment.

The appellate court has broad discretion in granting review, ordering oral argument and granting appropriate relief. A.R.S. § 13-4239(E); Rule 32.9(e). Generally, the appellate court will not be reversed absent an abuse of discretion. *State v. Wilson*, 179 Ariz. 17, 875 P.2d 1322 (App. Div. 1 1993); *State v. Wiley*, 199 Ariz. 242, 16 P.3d 803 (App. Div. 2 2001).

D. Stay of Proceedings Pending Review

If the state files a motion for rehearing or a petition for review after the trial court grants the petitioner a new trial, a stay of an order granting a new trial is automatically granted until final review is completed. Rule 32.9(d). If any other relief is granted, the trial or appellate court has the discretion to grant or deny a stay of proceedings until final review. *Id*. Either way, the state is required to notify the victim. *Id*.

VII. VICTIM'S RIGHTS

In keeping with the requirements of the Arizona Constitution's Victim's Bill of Rights, several provisions of Rule 32 require the state to keep the victim informed of various PCR proceedings. See Rule 32.4(a)(PCR notice filed); Rule 32.6(c)(hearing ordered); Rule 32.9(b)(action on motion for rehearing); Rule 32.9(d)(petition for review; stay of proceedings); Rule 32.9(f)(action taken on petition for review).

Additionally, in capital PCRs, the victims have the right to respond to a motion for an extension of the time to file a brief. A.R.S. § 13-4234.01; Rule 32.11. The victim must first file a notice of appearance pursuant to A.R.S. § 13-4234.01(A), in which he can specify whether to receive notice directly or through the prosecutor. *Id*. The notice of appearance should also indicate how notice should be effected (electronically, by telephone, or by regular mail). *Id*. If the victim has requested direct notification, the moving party must serve notice within 24 hours of filing the extension request. It is probably best, however, to serve notice simultaneously with the notice served to the opposing party. If the victim is to be notified through the state, the prosecutor must notify the victim within 24 hours of receiving the motion. *Id*. The victim may respond to the motion for an extension of time through the state. A.R.S. § 13-4234.01(C).

"In ruling on any request for an extension of a time limit set in this rule, the court shall consider the rights of the defendant and any victim to prompt and final conclusion of the case." *Id*. However, the victim does not have the right to oral argument. A.R.S. § 13-4234.01(E).